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In the

Supreme Court of the United States

No. 711.

H. J. GORMAN, City Treasurer of Kansas City, Missouri, and FRANK McCABE, City Assessor of Kansas City, Missouri, *Petitioners*,

vs.

THE WASHINGTON UNIVERSITY, *Respondent*.

PETITION FOR REHEARING.

WM. E. KEMP,
City Counselor of Kansas City, Mo.,
ARTHUR R. WOLFE,
JOHN J. COSGROVE,
Assistant City Counselors,
Attorneys for Petitioners.

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THE WASHINGTON UNIVERSITY, *Respondent.*

PETITION FOR REHEARING.

Come now petitioners and respectfully petition this Court to grant them a rehearing in the above entitled cause, and in support thereof, state:

In deciding that petitioners had a right, under Section 4 of the 1890 Amendments to Article 6 of the Constitution of Missouri, to move for a transfer to the Missouri Supreme Court sitting *en banc*, this Court failed to give consideration to the construction placed by the Missouri Supreme Court

on said section. Under this construction it is our firm opinion that there existed no legal grounds for such a motion. It would seem that this opinion was shared by counsel for respondents inasmuch as they did not raise this jurisdictional point at any time in these proceedings.

In the case of *McAllister* v. *Terminal Railway Co.*, 324 Mo. 1005, l. c. 1020, the Missouri Supreme Court said:

> "Cases arising under the Constitution of the United States, acts of Congress, or treaties, and involving their interpretation and application, and of which jurisdiction is given to the Federal Courts, are commonly described by the legal profession as cases involving a 'Federal question.' (Black's Law Dictionary; *In re Sievers*, 91 Fed. 366, 372; *Williams* v. *Bruffy*, 102 U. S. 248, 20 L. Ed. 135). If the above reference to a Federal question had occurred without synonymous or qualifying terms in Article VI of the Constitution as originally adopted, it might be given this broad interpretation. However, appearing as it does in an amendment to Article VI and adopted some fifteen years thereafter we think the words 'when a federal question is involved' should be interpreted according to the standard originally indicated and still set forth in Article VI. Section 12 of that article fixes our jurisdiction, and the only Federal questions there mentioned are those 'involving the construction of the Constitution of the United States,' or where 'the validity of a treaty or statute of or authority exercised under the United States is drawn in question.'"

This doctrine was reaffirmed in the case of *Huckleberry* v. *Missouri Pacific Railroad Co.*, 324 Mo. 1025, l. c. 1042, wherein the court said:

> "The question here raised involves the interpretation and application and not 'the validity' of the statute or authority exercised under the United States. Under our ruling in *Florence McAllister, Administratrix of the*

Estate of William McAllister, v. *St. Louis Merchants' Bridge Terminal Railway Company*, *ante*, p. 1005, 25 S. W. (2d) 791, this is not a proper ground for transfer to Court *en Banc*. The motion to transfer is denied."

II.

Finality of Divisional Opinion.

Likewise, this Court failed to take into consideration the law of this state as announced in the decisions of the Missouri Supreme Court with respect to constitutional questions regarded as settled. Frivolous and no longer debatable are constitutional contentions that have been previously determined, and the supreme court has consistently refused to consider them. Where the appeal should have been lodged in a Court of Appeals, save for the alleged constitutional question, the case will be transferred to that court.

In the case of *First National Bank* v. *Missouri Glass Co.*, 147 S. W. 1030, where appellant contended that certain state statutes were contrary to the Federal Commerce Act and to the 14th Amendment to the Constitution of the United States, the Missouri Supreme Court said:

> "This was not an open question when the present appeal was taken. If we take cognizance of this appeal, we should simply have to reiterate our former decisions that the statute of this state regulating trusts do not offend either the Constitution of the state or of the United States, but are valid and wholesome exercises of the police power inherent in every sovereign state to protect its citizenry. Where constitutional contentions are no longer debatable, this court will treat their reassertion as frivolous, and will not permit it to dislodge the otherwise rightful jurisdiction of the Court of Appeals. *State* v. *Campbell*, 214 Mo. 362; *Dickey* v. *Holmes*, 208 Mo. 664."

Following are a few of the many cases declaring the same doctrine:

> *State* v. *Swift & Co.*, 207 Mo. 695;
> *Portwright* v. *R. R.*, 183 Mo. 72;

Schmidt v. *Sup. Ct. U. O. F.*, 259 Mo. 491;
State v. *Everetz*, 190 S. W. 287.

Where the constitutional question was open at the time of appeal (which would give jurisdiction to the Supreme Court) but which constitutional question had been decided before submission, in some other case, the constitutional question will be ignored and only the merits considered. This was the procedure adopted in:

Tandy v. *Railway*, 178 Mo. 240;

Lee v. *Jones*, 181 Mo. 291, wherein the court said: "A constitutional question once settled is no longer a constitutional question in this state."

Non-Royalty Shoe Co. v. *Phoenix Assur. Co.*, 277 Mo. 399.

The last mentioned case reached the Supreme Court by certification of the Court of Appeals and not by direct appeal.

Under these decisions the continuing validity of the legislative enactment conferring charter rights upon respondent University was no longer an open question in this state; neither was the validity of the authority exercised under the United States as expressed in *Washington University* v. *Rowse*, 75 U. S. 439, an open question. This for the reason that in the case of *Washington University* v. *Baumann*, 341 Mo. 708, which, upon appeal from the judgment of the trial court, was sent directly to the Court *en banc*, our Supreme Court sustained the enactment, held the Rowse case to be decisive and declared the charter to be a valid contract between the University and the State. More than that, in the case at bar the Missouri Supreme Court reasserted its adherence to the doctrine of the Baumann case and again declared

its obligation to follow *University* v. *Rowse*, 75 U. S. 439, which it held to be "commandingly decisive" of this question. It would seem that there could be no more convincing evidence that the Missouri Supreme Court regarded these questions as finally settled, and under the doctrine of the above cited cases, not a proper subject for transfer to the Court *en banc*.

But because the Missouri Supreme Court regarded these constitutional questions as settled did not foreclose petitioners from laying a foundation for a review by this court. This they did by raising a new question, which the Missouri Supreme Court in its opinion (R. 175), put thus:

> "Appellants principal contention is that the question whether the University's charter constitutes a contract with the state is again open for determination because of the ruling of *Erie Railroad Co.* v. *Thompkins*, 304 U. S. 64."

Such a question as well as the questions raised by respondent necessarily lodged petitioners' appeal in the Supreme Court, which appeal under the doctrine of the cases cited, *supra*, could have been dismissed had the court seen fit, and might have been dismissed had not petitioners invoked the rule announced in the *Erie Railroad* case. Division 1 of the Missouri Supreme Court, where the case was set, ruled adversely to petitioners, but after that ruling, under the decisions, *supra*, they could go no further. Why? First, to repeat, the constitutional questions raised were no longer debatable questions in Missouri and any attempt to transfer to *banc* would be regarded as frivolous. Second, because petitioner's reliance upon the Erie Railroad case raised no federal question within the definition of the McAllister and Huckelberry cases, *supra*, entitling them to move for a transfer to the court in *banc*—it involved no construction of the Constitu-

tion of the United States, drew in question the validity of no federal treaty or statute, challenged the validity of no authority exercised under the United States. On the contrary petitioners, by invoking the doctrine of the Erie case, asserted a right under an authority exercised under the United States (*Pittsburgh, etc.* v. *Loan & Trust Co.*, 172 U. S. 507), and brought themselves within the provisions of paragraph B., Section 237 of the Judicial Code.

It might be asked: If the constitutional questions presented to the Missouri Supreme Court in this case were no longer debatable why did that court again pass upon them? This we can only conjecture. Possibly because petitioners' contentions with reference to the Erie Railroad case were regarded as so interrelated that a decision of them necessarily involved a reiteration of the previous decision of the constitutional question. Or possibly because the constitutional contentions of respondent University were in harmony with the prior decision and the court deemed it not inappropriate to reaffirm what it had previously held in the Baumann case.

Once before, in *Curtice* v. *Schmidt*, 202 Mo. 703 (the only departure we have found from the established law) the Supreme Court, having ordered by mandamus a transfer from the Court of Appeals, considered a constitutional question that had previously been decided. But in that case also, the contention was in harmony with the previous ruling—a charter provision twice held to be invalid was again assailed as invalid. But if the charter provision had previously been held valid, would the court again have considered the contention of invalidity? We find no such instance in the decisions of our Supreme Court. Why then should it be said that the Supreme Court, in disregard of the established law, in the very teeth of a *banc* decision upholding respondent's charter, might have reconsidered on motion for rehearing,

petitioners' repetitious contention that the charter was invalid?

On the contrary, by the Missouri Supreme Court's unqualified endorsement of the Baumann case, by its unequivocable adherence to the Rowse case it, in effect, reasserted that the constitutional contentions decided were no longer open to question, and that a motion urging further consideration would, under the well settled law as announced by that court, be deemed frivolous.

The finality of the divisional opinion is emphasized by the concluding clause of Section 4 of the 1890 Amendments to the Missouri Constitution.

> "* * *; or when a division in which a cause is pending shall so order, the cause shall be transferred to the court for its decision."

Power is thus given a division of the Supreme Court of Missouri, of its own motion, to transfer to *banc* for any cause and it must be conceded that if the court believed that the constitutional questions had not been settled and that petitioners reliance on the Erie case presented a federal question within the definition of the *McAllister* case, it would have transferred the cause to *banc* even though no motion was filed. We submit that petitioners should not be penalized by having their case dismissed in this Court for not having pursued a course so obviously futile and which the Supreme Court of Missouri has so consistently disapproved.

III.

Cases Cited by This Court Distinguished.

We respectfully submit that an examination of each of the cases cited in this Court's opinion as authority for its order of dismissal of the writ of certiorari granted herein, discloses that in each case a situation was presented wherein the petitioner failed to avail himself of a clear right either to an appeal or to petition for an appeal and where either the granting of an appeal was mandatory or the determination of such petition was clearly open to the discretion of the Court to grant or deny. On the other hand, it is the law of Missouri that where constitutional questions have been settled by a prior decision of the Supreme Court they are no longer debatable, and the Court will refuse to consider them. Under that law petitioners had no right to a transfer of the cause to the Court in *banc* and the filing of a motion to that end would have been frivolous.

Conclusion.

In conclusion we respectfully submit that the law does not require the doing of a useless and futile act. As we understand the decisions of our Supreme Court there was no legal basis for a motion by petitioners to transfer this cause to the Court *en banc*. To have filed a motion for such transfer would, under these authorities, have constituted a mere frivolous act. A transfer could not have been had *upon petitioners' motion*, either as a matter of right or, indeed, within the discretion of said Court, for the reason that the Court by its uniform decisions has not only foreclosed itself from exercising such discretion, but has declared that where a constitutional question has been settled such a question no longer exists in this state. If the Court had any discretion with reference to a transfer of this cause to the Court *en banc*, it was a discretion to make such transfer only upon *its own motion* and this the Court failed to do. Thus the divisional opinion in this case was a decision of the highest court of the state to which these petitioners could appeal.

WHEREFORE, Petitioners respectfully pray this Court to grant them a rehearing in this cause.

WM. E. KEMP,
City Counselor of Kansas City, Mo.,
ARTHUR R. WOLFE,
JOHN J. COSGROVE,
Assistant City Counselors,
Attorneys for Petitioners.

Certificate.

Wm. E. Kemp, Attorney of Record for Petitioners, hereby certifies that this petition for rehearing is presented to this Honorable Court not for the purpose of delay, but in good faith, because counsel sincerely believes that the grounds stated in said petition for rehearing are meritorious.

WM. E. KEMP,
Attorney for Petitioners.

SUPREME COURT OF THE UNITED STATES.

No. 711.—October Term, 1941.

H. J. Gorman, City Treasurer of Kansas City, Missouri, and Frank McCabe, City Assessor of Kansas City, Missouri, Petitioners,
vs.
The Washington University.

On Writ of Certiorari to the Supreme Court of the State of Missouri.

[April 27, 1942.]

Mr. Chief Justice Stone delivered the opinion of the Court.

Respondent brought this suit in the Circuit Court of Jackson County, Missouri, to restrain the assessment and collection of a tax upon its real estate. The validity of the provisions of the state constitution and statutes under which the tax was laid was assailed on the ground that they violate the tax-exemption provision of respondent's charter and therefore conflict with the contract clause of the Constitution, Article I, § 10. The Supreme Court of Missouri affirmed the judgment of the trial court enjoining collection of the tax. 153 S. W. 2d 35. Both courts held that the Missouri constitution and statutes as applied violate respondent's charter provisions for tax exemption, and infringe the contract clause of the Constitution. Cf. *Washington University* v. *Rouse*, 8 Wall. 439; *Washington University* v. *Baumann*, 341 Mo. 708. We granted a writ of certiorari, 314 U. S. —, to review the constitutional question decided by the state court.

Upon examination of the record it appears that the decision and judgment brought here for review were rendered by Division One of the Supreme Court of Missouri, which consists of four of the seven judges of the court. It does not appear that the judgment thus rendered has been reviewed by the Supreme Court sitting *en banc* or that petitioners have made application, as they could have done under § 4 of the 1890 amendments to Article VI of the state constitution, to transfer the cause to the full court for review. The question thus arises whether we have jurisdiction under

§ 237(b) of the Judicial Code, which restricts our authority to review decisions of state courts to those causes wherein a judgment has been rendered "by the highest court of a state in which a decision could be had".

Section 1 of the 1890 amendments to Article VI of the Missouri constitution provides that the Supreme Court shall consist of seven judges and "shall be divided into two divisions", one of four and the other of three judges. It directs that a division shall sit separately for the hearing and disposition of causes and shall have concurrent jurisdiction of all matters and causes in the Supreme Court, except that Division Two shall have exclusive cognizance of criminal causes, and that the "judgments and decrees of either division, as to causes and matters pending before it, shall have the force and effect of those of the court".

But § 1 also contains a proviso that a cause pending in a division may be transferred to the court as provided in § 4. Section 4 reads as follows:

"When the judges of a division are equally divided in opinion in a cause, or when a judge of a division dissents from the opinion therein, or when a federal question is involved, the cause, on the application of the losing party, shall be transferred to the court for its decision; . . ."

And Rule 24 of the Rules of the Supreme Court of Missouri authorizes the transfer by motion of a cause pursuant to the provisions of the constitution, "from either division to Court En Banc" "after final disposition of the cause by the division".

Under these provisions Division One of the Supreme Court of Missouri, sitting in the present cause, in which "a federal question is involved", was not the last state court in which a decision of that question could be had. Such a case is one which "after final disposition of the cause by the division" could on petitioners' application be transferred to the full court for review, and the decision and judgment rendered by Division One could be set aside by the court sitting *en banc*. Since the constitution of Missouri has thus provided in this class of cases for review of the judgment of a division, the judgment here of Division One is not that of the "highest court of the state in which a decision could be had" within the meaning of § 237(b) of the Judicial Code.

It was the purpose of the Judiciary Act of February 13, 1925, as well as that of all its predecessors, that no decision of a state court should be brought here for review either by appeal or

certiorari until the possibilities afforded by state procedure for its review by all state tribunals have been exhausted. *Fisher* v. *Perkins*, 122 U. S. 522; *McComb* v. *Commissioners*, 91 U. S. 1, 2; *McMaster* v. *Gould*, 276 U. S. 284; *Southern Electric Co.* v. *Stoddard*, 269 U. S. 186; *Stratton* v. *Stratton*, 239 U. S. 55; *Millen* v. *Western Union Beef Co.*, 173 U. S. 116; *Great Western Telegraph Co.* v. *Burnham*, 162 U. S. 339. Hence it is the last state tribunal—here the court *en banc*—to which the cause could be brought for review which is the "highest court of a state in which a decision could be had" within the meaning of the jurisdictional statute, regardless of the particular description or designation which may be applied to it by state statutes.

Upon application to this Court for review of the judgment of a state court it is the petitioner's burden to show affirmatively that we have jurisdiction. *Memphis Natural Gas Co.* v. *Beeler*, 315 U. S. —. As the record fails to disclose that the judgment, review of which is now sought, is that of the highest court of the state in which a decision could be had, we are without jurisdiction and the writ must be

Dismissed.

A true copy.

Test:

Clerk, Supreme Court, U. S.